No. 84-277

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IN THE

Supreme Court of the United States

October Term, 1984

THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE and THE VILLAGE OF SCARSDALE,

Petitioners,

vs.

KATHLEEN S. McCREARY, DAVID DRABKIN, ANN F. CRAWLEY, ANGELINA J. MESSENGER, EDWARD R. NAPOLITANO, CHARLES E. BUTLER, JOHN D. HAWKINS, NANCY G. STEGER, RICHARD CACCIATO, CAROL ANN PASCAL, MARY T. THOMPSON and GREGORY DE SOUSA,

and

THE SCARSDALE CRECHE COMMITTEE, PATRICIA CURRAN, CYNTHIA BARSUHN, GRACE FELLOWS, DORIS ADLER, MARY TULLY, JOAN MANN and MARIA PEDULLA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE AMERICAN JEWISH COMMITTEE AND THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Question Presented

Whether a municipal governing board acts consistently with both the Establishment Clause and the Free Speech Clause of the First Amendment when it refuses to allow a Creche to be placed in a small public park for approximately two weeks of the Christmas season.

Statement of Interest

The American Jewish Committee (AJC) and the National Council of the Churches of Christ in the U.S.A., as *amici curiae,* respectfully submit this brief supporting reversal of the decision below.

The American Jewish Committee, a national organization of approximately 50,000 members founded in 1906, is dedicated to the defense of the civil rights and religious liberties of American Jews. AJC is committed to the belief that separation of religion and government is the surest guarantee of religious liberty and has proved of inestimable value to the free exercise of religion in a pluralistic society.

In the view of AJC, municipal acceptance of a Creche on public property represents official endorsement of a religious message that Jews do not accept and reflects invidiously on Jewish religious beliefs and on the status of Jews in the political community. In the view of AJC, a Creche, which depicts the birth of Jesus as the birth of a divinity is unmistakably and unalterably religious, indeed doctrinal, in nature. The placement of such a Creche in a Scarsdale public park over a two week period, not as part of some more secular or commercial display, but for the purpose of promoting its religious content, would have been tantamount to state acceptance of a particular religious

doctrine, and the Scarsdale Trustees thus acted well within their rights in refusing to permit such a display. AJC would feel the same with regard to the acceptance by municipal authorities of a menorah or any other religious symbol. The First Amendment is equally contravened by the long-term display of an inherently religious symbol standing alone, whatever the religion involved.

The National Council of the Churches of Christ in the U.S.A. is the cooperative agency of thirty-one national religious bodies in the United States having an aggregate membership of over 40,000,000. The Council does not presume to speak for all of those adherents but for its Governing Board, the body of some 280 members appointed by the several member denominations in proportion to their size and their support of the Council.

In the view of the National Council of Churches, the municipal acceptance of a Creche on public property not only degrades and secularizes a sacred symbol of Christianity, but also represents either a presumptuous identification by government with that religion and its symbols or an equally presumptuous identification by Christians of their religious traditions with the institutions of government. A municipality acts well within its prerogatives when it declines to accept on public property such an affront to non-Christian citizens. Religion has been, is, and must continue to be a vital, vigorous and legitimate element in American public life; but that should be effected, not by state action, but by citizen action within the private sphere. There are many ways in which citizens, individually and in voluntary private groups of their own choosing, can express their religious views, commitments, symbols and aspirations without employing or seeking to employ the machinery and passive sponsorship of the state for their free exercise of religion.

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First Amendment, United States Constitution ..... *passim*

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This brief is submitted with the consent of the parties.

Statement of the Case

Amici incorporate by reference the Statement of the Case set forth in the petitioners' Petition for a Writ of Certiorari. The opinion of the Court of Appeals, No. 83-9052, slip. op. (2d Cir. June 21, 1984), has not yet been reported. The opinion of the District Court is reported at 575 F. Supp. 1112 (S.D.N.Y. 1983).

Summary of Argument

Religious Americans of both Christian and non-Christian persuasions recognize that in a pluralistic society the key to the free and robust exercise of religion lies in a strict separation of church and state. The Constitution sets forth the minimum legal requirements for maintaining this policy; but it in no way prohibits local governments from taking reasonable additional measures to further this policy even when such measures are not compelled by the Constitution.

It was not unreasonable for the Board of Trustees of the Village of Scarsdale to conclude that the placement of a large depiction of the Christian Holy Family, unaccompanied by secular images, in a small public park frequented by Christians and non-Christians alike would not only give offense and inflame religious sensitivities but would undermine the neutrality of government toward religion essential to the maintenance of harmony in this multi-religious community. This decision may well have been mandated by the Establishment Clause of the Constitution; for here there were present none of the secularizing components, such as related displays of Santas, reindeer, and commercial images,

that led the Court to conclude, in its close and narrow decision in *Lynch* v. *Donnelly,* 104 S. Ct. 1355 (1984), that the erection of a Creche with public support in the City of Pawtucket was not, in context, unconstitutional. But even if *Lynch* is interpreted as *permitting* the Scarsdale Trustees to authorize erection of a Creche in the public park, nothing in *Lynch* can be read as *compelling* such a result or as depriving the Trustees of reasonable discretion in determining what displays are offensive to local sensibilities and disruptive of the Village's policy of pluralistic harmony.

Nor is the freedom to exercise such discretion, within reasonable limits, in any way prohibited by the Free Speech Clause as interpreted in *Widmar* v. *Vincent,* 454 U.S. 263 (1981). A large religious symbol dominating a small public park over a period of two weeks is considerably more than, if not altogether different from, the kind of constitutionally-protected speech at issue in *Widmar,* such as religious talks, prayers, and other forms of temporary oral expression. Even as to these latter forms of speech, *Widmar* does not preclude some opportunity for the exercise of discretion appropriate to local conditions.

In such a sensitive area, delicate balancings responsive to local conditions ought to be encouraged. The broad mandates of the Constitution do not dictate every such balance; rather, they provide a framework within which it is left to local officials to work out suitable accommodations. The determinations of the Scarsdale Trustees were well within this framework and ought to have been left undisturbed by the Court of Appeals.

ARGUMENT

Governmental Refusal to Allow the Erection of a Creche on Public Park Land is Wholly Consistent With, if Not, Indeed, Compelled By, the Establishment Clause of the Constitution and Does Not Offend the Free Speech Clause.

When the Framers of the Constitution mandated that "Congress shall make no law respecting an establishment of religion," their purposes were "to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other"[1] and to ensure that government maintain a position of "neutrality" with respect to religion—neither endorsing nor inhibiting the promulgation and practice of religious beliefs.[2] But the Establishment Clause does not itself prescribe how these policies of separation and neutrality are best achieved in every circumstance. As this Court recognized less than one year ago, "[t]he Establishment Clause like the Due Process Clause is not a precise, detailed provision in a legal code capable of ready application. The purpose of the Establishment Clause 'was to state an objective, not to write a statute.'" *Lynch* v. *Donnelly,* 104 S. Ct. 1355, 1362-63 (1984) (quoting *Walz* v. *Tax Commission,* 397 U.S. 664, 668 (1970)).

To be sure, the Establishment Clause, as elaborated by this Court, sets forth the minimum legal requirements for

1. *Lemon* v. *Kurtzman,* 403 U.S. 602, 614 (1971).

2. *Everson* v. *Board of Education,* 330 U.S. 1, 15 (1947) ("Neither a State nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another"); *Epperson* v. *Arkansas,* 393 U.S. 97, 103-04 (1968); *Committee for Public Education* v. *Nyquist,* 413 U.S. 756, 792-93 (1973).

maintaining the requisite separation and neutrality—and, in our view (as set forth in subsection A, *infra*), these minimum requirements compelled the Scarsdale Trustees to refuse permission for erection of the Creche here. But even if such a result were not compelled, we believe (as set forth in subsection B, *infra*) that the Scarsdale Trustees retained discretion to reasonably implement the objectives of the Establishment Clause by refusing such permission and that such refusal did not offend the Free Speech Clause.

A. The Decision of the Scarsdale Trustees Denying Permission for Erection of the Creche Was Required by the Establishment Clause.

It is generally accepted that a Nativity Creche, standing alone, has an obvious "religious and indeed sectarian significance." *Lynch* v. *Donnelly, supra,* 104 S. Ct. at 1369 (O'Connor, J., concurring). Its sole and obvious content is the depiction, in adorational terms, of the birth of a divinity in the form of the Infant Jesus. It is hard to think of a doctrine that is more quintessentially religious in nature than that embodied in the Creche. The doctrine of the birth of Jesus is not only central to Christianity but also serves, both historically and theologically, to separate Christianity from other religions.

To be sure, this Court, in its close and narrow decision last term in *Lynch* v. *Donnelly, supra,* held that the erection of a Creche by the City of Pawtucket, as part of a more general secular and commercial Christmas display, did not offend the Establishment Clause, but that was because, in that "context," the purpose and effect of the Creche were substantially secularized. Although some language in

the Court's opinion suggests that by "context" it meant no more than the temporal association of the Creche with the substantially secularized holiday of Christmas, other language in the opinion suggests that the Court's focus was on the physical placement of the Pawtucket Creche in a broader display of indisputably secular images, including Santa Claus, reindeer, bright lights, and the like. As Justice Brennan stated in his dissenting opinion (in which three other Justices joined): "The Court's decision implicitly leaves open questions concerning the constitutionality of the public display on public property of a creche standing alone. . . ." *Id.* at 1370.[3]

This "open question" is now before the Court in this case, and we submit it should be answered by holding that, in the absence of some materially secularizing context such as the accompanying displays in *Lynch,* the erection on public property of a large display that is essentially religious, sectarian and doctrinal in nature offends the Establishment Clause. It is noteworthy, in this regard, that the very factors relied upon by this Court in determining that the Creche display in *Lynch* did not violate the Establishment Clause are entirely absent from the present case.

First, in terms of immediate physical context, here there are present none of the secularizing components present in the Christmas display in *Lynch,* which contained a host of secular objects ranging from a Santa Claus to a teddy bear. To the contrary, the Scarsdale Creche was to have

3. The accompanying footnote to this sentence of Justice Brennan's dissent cites, *inter alia,* the district court's decision in the instant case.

stood essentially alone in the small (less than one-tenth of an acre) public park in the Village center.

Second, in terms of broader, historical context, whereas in *Lynch* there was "no evidence of political friction or divisiveness over the creche in the 40-year history of Pawtucket's Christmas celebration," *Lynch, supra,* 104 S. Ct. at 1365, here the issue has been hotly contested in Scarsdale, escalating toward great interdominational discord and acrimony in the community. (See *infra* at pp. 15-18). This is not to say that political divisiveness alone is sufficient to invalidate otherwise permissible conduct. *See Lynch, supra,* 104 S. Ct. at 1364. But in evaluating the "context" in which a Creche is to be viewed, attention surely should be paid to whether a substantial part of the community (in this case, indeed, probably a majority, consisting of both Christians and non-Christians), regards the Creche in question as having a substantially (and offensively) religious object.[4]

Finally, and most significantly, whereas the Nativity display in *Lynch* served the "legitimate secular purpose" of attracting shoppers to a commercial district, the record in this case overwhelmingly supports the conclusion that the primary, if not sole, purpose of the Scarsdale Creche

4. If "context" is to be the talisman for assessing whether a Creche is secular or sectarian in purpose and effect, it becomes appropriate to view the entire historical and social context relating to the Creche and not merely its immediate physical context. As noted, the Creche not only displays an essential event in the origins of Christianity but also represents essential doctrine—the belief in the divinity of Jesus—which first and foremost separates Christianity from other religions. It is because of the fundamentally religious nature of the Creche that the sensibilities of non-Christian Americans, and Christians who are offended by such use of a religious symbol, must be recognized. *Cf. Everson* v. *Board of Education, supra,* 330 U.S. at 8-9.

is religious in nature.[5] With respect to the Creche itself, the Creche Committee respondents concede that the Creche is a "religious symbol" and the Citizens Group respondents admit that "the purpose of the display was to celebrate and express religious convictions." Furthermore, given that the Creche Committee rejected alternative private sites for its display, but was willing to display the Creche at two other public sites, it seems clear that the Creche Committee wished to display the Creche only in a context where its admittedly religious message would receive the benefit of tacit governmental endorsement.[6] This belies any contention that there was a "legitimate secular purpose" for the Scarsdale Creche.[7]

5. Indeed, the Court of Appeals did not so much dispute this as claim that such religious purpose was, in this case, an exercise of free speech and protected on that ground—a claim we deal with in Subsection B, *infra*.

6. *See Goldstein* v. *Fire Department of the Village of Suffern*, 559 F. Supp. 1389 (S.D.N.Y. 1983), holding that the erection of a sign reading "Keep Christ in Christmas" on the front of a municipal firehouse violates the Establishment Clause, since the sign referred to the Christian theory of Christmas, and "created the obvious impression that defendants either were promoting or approving of the theological origins of Christmas." *Id.* at 1391.

7. In her concurrence in *Lynch*, Justice O'Connor specifically referred to certain factors necessary to her holding that the erection of the Pawtucket Creche fulfilled a "legitimate secular purpose":

> . . . I would find that Pawtucket did *not* intend to convey any message of endorsement of Christianity or disapproval of non-Christian religions. The evident purpose of including the creche in the larger display was not promotion of the religious content of the creche by celebration of the public holiday through its traditional symbols. Celebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose.

Lynch v. *Donnelly, supra*, 104 S. Ct. at 1368 (emphasis supplied). Here, as discussed above, the historical and physical context of the Creche taken together with the Creche Committee's refusal of alternative private sites make clear that the Scarsdale Creche is intended to convey the very endorsement of Christianity which Justice O'Connor held was not present in *Lynch*.

As recently recognized by this Court, Government need spend no money to advance religion in violation of the Establishment Clause: "the mere appearance of a joint exercise of . . . authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason by the power conferred," and therefore may impermissibly advance religion. *Larkin* v. *Grendel's Den, Inc.*, 103 S. Ct. 505, 511 (1982). Indeed, the focus of the Establishment Clause is on the state's endorsement of a particular activity, not on whether the funds used to construct such symbols are public or private. *See, e.g., Stone* v. *Graham*, 449 U.S. 39, 42 (1980); *Engel* v. *Vitale*, 370 U.S. 421, 431 (1962); *American Civil Liberties Union of Georgia* v. *Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1110 n. 22 (11th Cir. 1983). In this case the erection of this large, unsecularized Creche, for a two-week period, on a prominent piece of public property, lends an unmistakable aura of Village approval to the display.[8] This is far more than the religious "accommodation" which the Court in *Lynch* stressed could not be avoided. It constitutes a wholly unnecessary, and wholly unsecular, violation of the Establishment Clause.

8. Given the extensive duration, size and unsecularized nature of the Creche, the direction of the Court of Appeals that "an appropriate disclaimer sign or signs" be erected cannot remove this aura of Village approval. Moreover, even if the Court were to find that the Scarsdale Trustees were not *required* to deny permission to erect the Creche, the legitimate question as to the efficacy of such a disclaimer certainly should support a finding that the Trustees were not required to *accept* the Creche either. That there is a legitimate question as to the efficacy of a disclaimer is borne out by the Court of Appeals' finding that the disclaimer sign erected in previous years was "too small" and that court's remand for proceedings in order to determine the "size, visibility and message" of the disclaimer to be erected pursuant to its direction.

B. At All Events, the Constitution Did Not Compel The Scarsdale Trustees To Approve Erection of the Creche.

Even if the Establishment Clause did not flatly require the Scarsdale Trustees to refuse permission for the erection of the Creche in the context of this case (as *amici* believe it does), the Trustees surely had the right to go beyond the constitutionally-prescribed minimum in attempting to implement the policies of separation and neutrality that form the objectives of the Establishment Clause. As Justice White noted in his dissenting opinion in *Widmar* v. *Vincent,* 454 U.S. 263, 282 (1981) (emphasis in original):

> The Establishment Clause . . . sets limits only on what the State may do with respect to religious organizations; it does not establish what the State is *required* to do.[9]

The record here speaks eloquently to the fact that the Scarsdale Trustees, in attempting to achieve harmony within their own community and a balance between the competing objectives of the Establishment Clause and the Free Speech Clause as applied to the peculiar circumstances of this case, acted reasonably and responsibly in coming to the conclusion that the Scarsdale Creche ought more appropriately to be erected on the available private land than on the requested public land.[10]

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9. Justice White went on to reason: "just as there is room under the Religion Clauses for state policies that may have some beneficial effect on religion, there is also room for state policies that may incidentally burden religion." *Id.*

10. In so acting, the Trustees were carrying forth the mandate of this Court in *Lynch, supra,* 104 S. Ct. at 1361: "In our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court".

For example, the facts developed in the record bear out the reasonableness of the conclusion of the Scarsdale Trustees that the erection of a large adorational Creche, unaccompanied by secular images, in a small public park frequented by Christians and non-Christians alike would not only give offense and inflame religious sensitivities but would undermine the neutrality of government with respect to religion that is essential to the maintenance of harmony in a multi-religious community. As early as 1960 the American Jewish Congress expressed its concern to the Scarsdale Trustees over the placement of a "religious display on public property;" its letter to the Scarsdale Board of Trustees stated: "[w]e, as members of the Jewish faith, find religious display[s] natural and acceptable on church property, but are distressed by them when they appear in a public place shared by all residents of our community." The letter requested that the Scarsdale Trustees "safeguard the neighborly feeling in our community by arriving at a decision which will strengthen the American principle of separation of Church and State." The letter was followed by an increasing volume of protest, response, study, and division among the Trustees. The statements of the Trustees who abstained or voted to deny the Creche application post-1972 indicate that these trustees were concerned that approval might violate either the letter or the spirit of the constitutional prescription that government must remain neutral with respect to religion.

Later, in recognition of the increasing division in the community on the Creche issue, a group of ten members of the clergy from five Scarsdale churches wrote to the Scarsdale Board of Trustees offering their respective church properties, on an annually rotating basis, for dis-

play of the Creche. In making this offer, these clergymen held firm to their commitment to the separation of church and state as the means to ensure religious pluralism and freedom:

> The symbols of religion say different things to different people. A Creche, for example, symbolically makes a particular religious statement which is not held by all.
>
> In keeping with our respect for one another's beliefs and in keeping with our government's position to protect religious freedom without promoting or restricting particular religious views, we believe that it is inappropriate to use public property to make a religious statement. The freedom here involved is the right of each individual within the community to be assured that no certain religious symbol is presumed to represent him on the property which belongs to him in common with the fellow members of his community.
>
> This is not to say that religious symbols should not be seen in a community. Homes, media announcements and places of worship can be used by those wishing to call attention to their beliefs. In this way, the religious pluralism and freedom which we enjoy in this country are best served.
>
> Our proposal, therefore, is not to remove the Creche from public view but rather to move the Creche to a location which is not public property.

(Ex. 62, pp. 3-4).

Unfortunately, as noted, this proposal was unacceptable to the sponsors of the Creche. They insisted that it be displayed on public land, or nowhere. In response, the Trustees, by a divided vote, denied application for erection of the Creche.

Viewed in this context, it is apparent that the decision of the Scarsdale Board of Trustees denying permission for

placement of the Creche on public property was wholly consistent with, and reflected a keen understanding of, the Establishment Clause. Yet, according to respondents (and the Court of Appeals), this reasoned and informed decision was itself unconstitutional because it offended (or at least did not give sufficient weight to) the Free Speech Clause of the Constitution. In particular, they claim, this Court's decision in *Widmar* v. *Vincent, supra,* should have compelled the Scarsdale Trustees to approve the erection of the Creche as an exercise of free speech in a public forum.

However, this argument overlooks crucial differences between this case and the free speech cases, including *Widmar*. First, unlike those cases where political speech is involved and only the Constitution's requirements of freedom of speech must be considered, here another Constitutional prescription comes into play—the Establishment Clause. As previously discussed, the Village had a right, if not a constitutional obligation, to take reasonable steps to assure its citizens that it was not promoting or endorsing one sect's religious beliefs. The Scarsdale Trustees did not enact an ordinance declaring the erection of a Creche illegal—they merely concluded that the Creche should not be placed on public land. Such balancing of Establishment Clause objectives against Free Speech objectives was perfectly proper and reasonable.

Second, the activity involved in the erection of the Creche, if "free speech" at all, was certainly of a kind rightly subject to more constraint than the oral expression involved in *Widmar* (which concerned use of a university facility for activities of a self-selecting student religious group). The erection and continuous display of a large

religious symbol over a prolonged period of time in the form of an elaborate and a semi-permanent structure is a form of expression totally different, both in kind and degree, from voluntary gatherings of students to discuss religious matters, or speeches given on public property by those advocating religious ideas. *See Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981); *Saia* v. *New York*, 334 U.S. 558 (1948). The duration of the display, its size and permanence all serve to distinguish the Creche from an instance of transitory speech tolerated by the state and make it more akin to the imposition of official doctrine endorsed by the state.[11]

Thus, this Court's holding in *Widmar* v. *Vincent, supra,* does not compel a contrary result. There this Court held that where a university made its facilities available to a wide spectrum of student groups, the overwhelming majority of which were secular, it also had to make those facilities available to students who, on a voluntary, self-selecting basis, wished to assemble and discuss religious matters. There the religious students wished no more for their religious discussions than the same rights of access granted to other students for their political, academic, and social pursuits. Here, by contrast, the Creche Committee seeks much more. It did not demand the right to solicit prospective adherents in the park, to distribute religious handbills there, or to set up a podium and speak out—those types of activities for which permission previously had been (and should have been) granted to others. Instead, it insisted upon the erection of a Creche that would be the

11. There is no question that Scarsdale could not erect, or permit the erection of, a church or a permanent altar in Boniface Circle. *Tilton* v. *Richardson*, 403 U.S. 672, 683 (1971).

focal point of Boniface Circle, and not for a matter of hours of a day, but for twenty-four hours for a period of ten days, a major display which would dominate public land and which would have been placed there, rather than on private property, so as to intentionally cause the Village to become a participant in the display. The unquestioned right of the municipality "to establish reasonable time, place, and manner regulations," *Widmar, supra,* 454 U.S. at 276, is alone sufficient to warrant refusal of such a demand.

Nothing in the foregoing should be interpreted so as to suggest that *amici* are not fully committed to the Court's reiteration in *Widmar* that ". . . First Amendment rights are entitled to special constitutional solicitude . . . [requiring] the most exacting scrutiny in cases in which a State undertakes to regulate speech on the basis of its content." *Id.* However, in engaging in that scrutiny the Court must balance the constitutionally mandated state interest in maintaining neutrality with respect to religious institutions. For the reasons noted above, we believe strongly that the similarities between *Widmar* and the case at bar are far outweighed by the differences. That the balance was weighed in favor of religious speech in *Widmar* by no means mandates that result in every case, and certainly does not prevent the state from establishing, as it did here (subject, as always, to the Court's scrutiny) "reasonable time, place and manner regulations." *Id.*

If the Constitution and the decisions of this Court are not to become an all-embracing administrative code, reasonable discretion must be accorded to municipalities, and other appropriate governmental authorities, to implement

broad, and in some instances competing, constitutional objectives through carefully considered decisions and balancings attuned to local conditions, experiences, and contexts. The decision of the Scarsdale Trustees to refuse to permit erection of the Creche more than met the standards for such implementation of the Constitution's objectives, and the rejection of that reasonable decision by the Court of Appeals should be reversed.

Conclusion

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Dated: November 29, 1984

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